COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether a state judge acts "under color of law" and engages in state action when he commits spontaneous sexual assaults, in his office, on employees, applicants for employment and co-workers.

2. Whether a state judge commits intended violations of "specific constitutional provisions", "specifically defined by case law", within the meaning of *Screws v. United States*, 325 U.S. 91 (1945), when he commits non-custodial sexual assaults upon employees, applicants for employment and co-workers, which the jury finds "shocking to the conscience".

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STATEMENT OF FACTS

The Respondent accepts the government's statement of facts, and supplements it with the following additional statements and observations.

In none of the instances in which the assaults alleged in this case occurred was the Respondent acting or purporting to act in his capacity as a judge. In each instance, his relationship with the woman involved was that of employer/employee, co-government employee or prospective employer. The assaults in each instance were described as spontaneous physical actions that did not purport to be related to the performance of any governmental duty.

Vivian Archie testified that the Respondent had previously granted her a divorce and had awarded her custody of her daughter. (J.A. 47). She testified that she was afraid that her father would file a petition for change of custody and that the Respondent would hear the case and award custody to her father, but she had no case pending before the Respondent at the time the assaults allegedly occurred. (J.A. 49). She testified that she mistakenly believed that the Respondent was the only judge who heard divorce cases in the county, except for "interchanges" in case of conflicts. In fact, the circuit judge had concurrent jurisdiction over divorce cases. (J.A. 59). Sometime after the alleged assaults occurred, Ms. Archie voluntarily surrendered custody of her daughter to her mother. The order transferring custody was not signed by the Respondent, but by the circuit judge. (J.A. 59).

SUMMARY OF ARGUMENT

Throughout this case, the government has failed to formulate a coherent and workable definition of the constitutional crimes the Respondent was convicted of. In its argument before this Court, it describes those crimes as violations of "the right to be free from wholly unjustifiable intrusions on bodily integrity" (Govt. Brief p. 35). If adopted, this immensely broad definition of due process violation would have the following effects: 1) as applied to the present case, it would sanction criminal convictions resulting in a total of 25 years imprisonment, based upon the commission of federal crimes that have never previously existed in American jurisprudence; 2) it would reverse *Screws v. United States*, 325 U.S. 91 (1945), which limited the application of 18 U.S.C. § 242 to intended violations of specific constitutional provisions, that have been specifically defined in prior court decisions; 3) it would extend the protection of the Due Process Clause to non-custodial assaults, contrary to recent holdings of this Court; 4) it would exponentially increase the scope of 18 U.S.C. § 242, by making assault and property crimes committed by state officials and employees subject to federal prosecution, without any discernible limitation.

The concept that all "wholly unjustified intrusions on bodily integrity" are due process violations – whenever, wherever and however committed – is a breathtakingly sweeping proposition. Stripped of its rhetorical elegance, the quoted phrase means that all criminal assaults are due process violations, since all criminal assaults "violate physical integrity" and no criminal assault is "justified". This definition of due process violation has no precedent in the case law of this Court or any federal court.

The government is forced to assert this sweeping definition because a narrower definition would not fit the facts of this case. The Respondent's convictions are based on the following facts: 1) he was found to have committed a series of sexual assaults, and 2) he was a judge. If these bare facts are not sufficient to establish due process violations – and they are not – the government cannot prevail in this appeal.

There is a decisive issue in this case that was not addressed in the Court of Appeals' opinion. In the trial court and in the Court of Appeals the Respondent asserted that 18 U.S.C. § 242 does not apply because the evidence does not show that he was acting under color of law when the alleged assaults occurred. A government official acts under color of law when he purports or pretends to exercise his governmental authority; not, as in this case, when he commits purely personal acts. *Screws v. United States*, 325 U.S. 91 (1945). It cannot seriously be asserted that the acts for which the Respondent was convicted were purported or pretended exercises of judicial authority.

In the court below, the government argued that, notwithstanding that the assaults were purely personal, obviously non-judicial acts, the Respondent acted under color of law because his position as a judge had an extortive or intimidating effect upon the women he assaulted. This is a clearly inappropriate and unprecedented application of the color of law requirement, the application of which depends upon the official or private quality of the defendant's acts, not upon his official status. *Screws v. United States, supra; Polk County v. Dodson*, 454 U.S. 312 (1981) (A state-employed public defender's

representation of clients too closely resembled the conduct of a private lawyer to constitute actions committed under color of law).

The color of law argument is crucial to this appeal, not only because it is outcome determinative in itself, but also because it places the due process argument in the proper context. The due process implications of an assault can be understood only if the governmental context in which the assault occurs is considered. The "color of law" under which the assault takes place must be known in order to determine whether a due process violation has taken place. An assault by a policeman who is purporting to do his duty may be a due process violation, whereas an assault by a judge whose duties do not include the use of force does not. The government's color of law and due process arguments fail for the same reason: the alleged assaults in this case did not occur in the context of any legal process.

The government devotes much of its argument to attacking the Court of Appeals' conclusion that a due process violation must be specifically defined by prior Supreme Court case law before it can be prosecuted. It is argued that this criterion is too strict because: 1) it unrealistically requires a prior case "on all fours" with the prosecuted case, and 2) it requires Supreme Court precedent. The Court of Appeals' criterion is an appropriate reading of the *Screws* opinion, but the government's precedential problems are much broader and deeper than its argument in opposition to that criterion would suggest:

1) The *Screws* decision not only required that criminal due process violations be defined by a factually similar precedent, it required that such violations be based upon specific constitutional provisions, rather than ongoing judicial interpretations of broad "life, liberty and property" due process interests, such as the government relies on in this case.

2) The *Screws* opinion expressly rejected the definition of due process violation the government proposes in this case. The Court refused to adopt the argument made by Justice Murphy in a dissenting opinion that the deprivation of "life" was a *per se* due process crime, stating: "the fact that a prisoner is assaulted or even murdered by a state official does not necessarily mean that he has been deprived of any rights secured by the Constitution . . . " 325 U.S. at 108, 109. In the present case, the government argues that the bare fact that a state official assaults a citizen *does* mean that a due process violation has occurred.

3) This Court has held that non-custodial assaults do not violate due process rights, because an incarceration, institutionalization, or other similar restraint of liberty is necessary in order to trigger the due process liberty interest. *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1984); c.f., *Ingraham v. Wright*, 430 U.S. 651 (1977), discussed on pp. 24-27, *infra*.

4) Lower federal court decisions holding that assaults violated due process rights have involved assaults committed on prisoners, arrestees, detainees and students, who were within the legitimate care or custody of the state when the assaults occurred. There is no lower

court precedent other than the panel decision in the present case, clearly holding that a non-custodial assault can constitute a violation of due process.

5) Several lower federal court decisions have held that non-custodial assaults do not violate due process rights, and in doing so, have relied upon the above Supreme Court precedents. See pp. 27-28, *infra*.

Thus, the government's extended argument regarding the alleged over-strictness of the Court of Appeals' criterion is essentially a red herring. Not only is there no Supreme Court authority "on all fours" with the present case that finds a due process violation: 1) there is no judicial authority of any kind that supports the government's assertion that physical assaults are *per se* due process violations, whenever, wherever and under whatever pretext they occur, and 2) there is abundant authority holding that non-custodial assaults do not, and cannot, violate due process. The government has essentially invented a federal crime to fit the facts of this case.

ARGUMENT

I.

These Non-custodial Assaults Were Not Committed Under Color Of Law And Did Not Constitute State Action.

The government has contended that the Respondent committed these alleged assaults "under color of law" and that they constituted state action, because the women were intimidated by the Respondent's status as a judge,

either fearful of what he might do to them in retaliation if they resisted or convinced that no action would be taken against him if they complained to authorities. The theory, in other words, is that the Respondent acted under color of law because his position as a judge assisted him in the commission of these flagrantly non-judicial actions.

This is a radical misapplication of the color of law/state action requirement. The decisions of this and other federal courts make it clear that "under color of law" refers to the defendant's official actions, not to his official status. The requirement is not met by evidence that the defendant had, or even exploited, an advantage derived from his position as a governmental official, as a means of committing private, unofficial acts. The acts themselves must have the aura, or "color", of governmental action. They must be abuses of governmental power, not purely personal actions which are facilitated by the possession of governmental power. See, *United States v. Screws*, 325 U.S. at 111 (1945) and other decisions cited on pp. 8-10, *infra*.

"Color of" is an old English legal term which is used in a variety of contexts. It means "having the appearance of", as in "color of title". The concept "under color of law [or office]" has been part of English law since the Thirteenth Century.[1] It was adroitly defined in a Sixteenth Century case as abusive official behavior "that carries the mask of virtue". *Dive v. Manningham*, 75 Eng. Rep. 96, 108 (1551). The classic American definition of "action under

[1] "No officer of the king 'by color of his office' without authority . . . [shall] disseize any of his freehold, nor of anything belonging to his freehold" 3 Ed. I, Ch. 24 (1275).

color of law" was stated, appropriately, in *United States v. Classic*, 313 U.S. 299, 326 (1941): "misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of law". A police officer acts under color of law when he misuses his power to arrest and restrain individuals by beating them excessively and vindictively. *United States v. Screws*, 325 U.S. 91, 110 (1945).[2] A judge acts under color of law when he misuses his power to control the composition of grand juries to exclude blacks *Ex Parte Virginia*, 100 U.S. 339, 346 (1880).[3]

An official may act under color of law even though he violates the law, if he acts with the pretence or appearance of carrying out his authorized duties. *Screws v. United States, supra*, 325 U.S. at 111 ("It is clear that under 'color' of law means under 'pretense' of law"). The "acts of officers in the ambit of their personal pursuits are [on the other hand] plainly excluded" from prosecutions under Section [242]. *Screws v. United States*, 325 U.S. at 111; c.f., *Polk County v. Dodson*, 454 U.S. 312, 318 (1981) (A

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[2] "[T]he defendants were officers of the law who . . . made the assault in order to protect themselves and to keep the prisoner from escaping. That was a duty they had under Georgia law. *United States v. Classic* is, therefore, indistinguishable from this case so far as 'color of law' is concerned. In each, officers of the State were performing official duties; in each the power they were authorized to exercise was misused."

[3] The Court held that the judge's actions were state action, because he was acting *as* a representative of the state, even though he abused his authority: "[A]s he acts in the name of and for the state, and is clothed with the State's power, his act is that of the State."

public defender did not act under color of law when she exercised "her independent professional judgment" as a "personal counselor and advocate", because she was acting on behalf of a private client rather than the state). *See also, Stengel v. Belcher*, 522 F.2d 431, 438 (6th Cir. 1975) ("Acts of officers who undertake to perform their official duties are included [within the statute] whether they hew to the line of their authority or overstep it" but "acts of officers in the ambit of their personal private pursuits fall outside of 42 U.S.C. § 1983"); *Murphy v. Chicago Transit Authority*, 638 F. Supp. 464 (N.D. Ill. 1986) (although the defendants' sexually harassing behavior toward a coworker was "made possible only because [the defendants] were given certain state authority, namely CTA staff attorney jobs," and occurred "in the course of exercising their authority," their actions did not occur "under color of law", because they "had nothing to do with, and bore no similarity to, the nature of the staff attorney job"); *Delcambre v. Delcambre*, 635 F.2d 407 (5th Cir. 1981) (A police chief charged with assaulting his sister-in-law in the municipal police station while on duty, did not act under color of law because the assault had no relation to the performance of his official duties); *Rogers v. Fuller*, 410 F. Supp. 187 (M.D. N.C. 1976) (Police officers who stole $35,000 in coins from the plaintiff's home while conducting an authorized search did not act "under color of law," because they did not "misuse their authority by confiscating the coins without justification," but merely stole them).

This Court has emphasized that it is not the defendant's status as a state employee or official when he commits wrongful acts that determines whether they are

committed under color of law, but the nature of the acts themselves. In that regard, the Court has not only distinguished between official and private actions, but between various categories of official action. In *Polk County v. Dodson*, 454 U.S. 312 (1981) a state-employed public defender was sued under § 1983, because of actions she took while representing a criminal client. Even though defending clients was a performance of part of the defendant's duties as a government employee, she was representing private, rather than state, interests when she did so. Thus the particular actions for which she was sued were held not to have been committed under color of law. Even the dissenting opinion of Justice Blackmun acknowledged that "acts committed under color of law" are restricted to "acts committed *in the performance of duties*". 454 U.S. at 329. (Emphasis added).

Manifestly, a judge who commits sexual assaults is not performing a "function" that has the remotest resemblance to an exercise of judicial duties or power. In arguing the contrary, the government uses the term "power" in a colloquial, non-legal sense. The contention is that the Respondent's status as a judge, and in one case, the prospect that he might in the future make a retaliatory use of his judicial authority, gave him "power" over the women, which assisted in the commission of the assaults. This is an obvious misapplication of the *Classic* definition. "Misuse of power" as used in that and subsequent decisions refers to exercises of official power or authority, not to extortive uses of official positions in the performance of purely personal actions, that bear no resemblance to those which the Respondent is legally authorized to perform. There must be a "pretended" exercise of lawful

authority – a "mask of virtue." See cases cited on pp. 8 & 9, *supra*. The government would have the Court read the statutory phrase "whoever under color of law" commits certain acts to mean "whoever takes advantage of his official position to" commit certain acts. That is not what the words of the statute mean, or have been held to mean.

The government's interpretation would open up a vast field of federal prosecutions never before conceived of. It would make federal crimes out of wrongful actions by state employees and officials whenever the fact of their state employment can be argued to be in any way material to the commission of the actions. A police officer who stole an item from a convenience store in the presence of a clerk, or a tax auditor who beat up someone in a fight, would be subject to federal prosecution if the victims testified that they did not resist because they were intimidated by the defendant's governmental position. These examples do not differ in principle from the present facts. The assertion that a judge acts under color or law and engages in state action when he commits sexual assaults upon employees and co-workers in his office is, in fact, about as far removed from logic and precedent as any application of this statute could be. It makes it a Hobbs Act of a civil rights statute, and creates a cornucopia of potential federal criminal prosecutions.

II.

These Non-Custodial Assaults Did Not Violate Due Process Of Law Within The Meaning Of 18 U.S.C. § 242.

The color of law/state action issue just discussed is integrally related to the due process analysis which follows. The government's color of law and due process arguments suffer from a common weakness: the private, non-process oriented nature of the Respondent's actions. The due process case law does not fit the present facts for the same reason the color of law case law does not. It is impossible to find a due process concept that applies to the use of force by an official whose lawful authority does not include the use of force. A policeman who engages in excessive force abuses a lawful custodial process, but a judge who does so is not operating within the ambit of the law at all. The present Respondent did not violate due process, essentially because he did not purport to be engaged in the administration of legal process when he committed these alleged assaults.[4] That simple proposition is at the core of the arguments which follow.

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[4] This argument does not ignore the existence of substantive due process rights (i.e., governmental action that is fundamentally unfair, regardless of the process by which it is administered). It merely notes that the use of violence unrelated to legal custody, or any other legal process, fits no known concept of due process violation, substantive or procedural. See, *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. at 200 ("In the substantive due process analysis, it is the state's affirmative act of restraining the individual's freedom to act on his own behalf through incarceration, institutionalization or other similar restriction of personal liberty which is the 'deprivation of liberty' triggering the due process clause").

1. The Vagueness and Open-endedness of the Due Process Concept.

"Due process of law" is the oldest of our constitutional concepts[5] and probably the most difficult to define. The traditional judicial approach has been to interpret "due process" broadly, as including "that which is implicit in the concept of ordered liberty", "fundamental standards of decency in the administration of justice" and like generalities, which judges give specific content to on a case-by-case basis.[6] An alternative view, personified principally by Justice Black, holds that such broad prescriptions inappropriately give judges "boundless power . . . periodically to expand and contract constitutional standards to conform to the Court's conception of what at a particular time constitutes 'civilized decency and fundamental liberty and justice.' " The Black "incorporation theory" asserts that due process should be interpreted as synonymous with the Bill of Rights provisions of the first eight amendments to the Constitution.[7] Only by such a

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[5] Due process of law is the one modern constitutional concept whose origin can legitimately be traced to Magna Charta: "No free man shall be taken or disseized or exiled or in any way destroyed, nor will we go upon him, nor send upon him, except . . . by the law of the land." Magna Charta, chapter 39.

[6] *E.g., Twining v. New Jersey*, 211 U.S. 78, 101 (1908) ("[T]hose fundamental principles, to be ascertained from time to time by judicial action, which have relation to process of law . . . and guard [the citizen] against the arbitrary action of government"); *Palko v. Connecticut*, 302 U.S. 319, 326 (1937) (That which is "implicit in a scheme of ordered liberty").

[7] "My study of the historical events that culminated in the Fourteenth Amendment, and the expressions of those who

construction, it is argued, can applications of the due process clause be kept within proper bounds of judicial discretion. *Adamson v. California*, 332 U.S. 46, 69, *et seq.* (1946) (Dissenting opinion of Justice Black).

While never adopting the incorporation theory as such, this Court has "been reluctant to expand the concept of substantive due process, because the guideposts for responsible decision-making in this uncharted area are scarce and open-ended." *Collins v. Harker Heights*, 503 U.S. 115, 125, 117 L. Ed. 2d 261, 273 (1992); *Albright v. Oliver*, 510 U.S. 266, 127 L. Ed. 2d 114, 122 (1994). Notwithstanding this reluctance, the currently prevailing approach to due process adjudication involves a "complex interplay of the Constitution, statutes and the facts" of each decided case, which makes the contours of due process elusive and difficult to predict from case to case. See, *Parratt v. Taylor*, 451 U.S. 527, 531, 532 (1981). Commentators have called due process jurisprudence a doctrine of "puzzles" which "subsists in

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sponsored and favored, as well as those who opposed its submission and passage, persuades me that one of the chief objects the provisions of the Fourteenth Amendment's first section, separately, and as a whole, were intended to accomplish was to make the Bill of Rights applicable to the states." *Adamson v. California*, 332 U.S. at 71 (1946) (Dissenting opinion of Justice Black).

confusion"[8] and have suggested that it often amounts to applying an "unwritten constitution".[9]

2. Violation of Due Process as a Crime: *Screws v. United States.*

The vague, open-ended nature of the due process concept makes it a particularly inappropriate standard for defining criminal conduct. A "doctrine of puzzles, subsisting in confusion" is not calculated to give potential defendants constitutionally adequate notice of what conduct is, or is not, criminal. (See, pp. 33-35, *infra.*) A crime that is defined and redefined on an ongoing case-by-case basis presents unique problems of *ex post facto* application and threatens undue judicial encroachment into the legislative domain. (See, pp. 35-40, *infra.*) Moreover, given the complexity of the federal court system, difficult issues of authoritativeness arise when definitions of crimes must be searched for in the case law. The question becomes: when does a category of conduct become a due process violation? When one circuit court of appeals recognizes it as such? When the court in the circuit in which the conduct occurs has recognized it as such? When a majority of circuits have? Or is a definitive holding by this

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[8] Fallon, "Some Confusions about Due Process, Judicial Review and Constitutional Remedies", 93 *Colum. L. Rev.* 309 (1993). See, also, Rubin, "Due Process and the Administrative State", 72 *Cal. L. Rev.* 1044 (1984) (Due process doctrine has experienced a "descent into uncertainty".)

[9] Grey, "Do We Have an Unwritten Constitution?", 27 *Stan. L. Rev.* 703 (1975).

Court required, as the Sixth Circuit Court of Appeals convincingly held in the present case?

The inherent vagueness of the due process concept very nearly led this Court to hold the predecessor to 18 U.S.C. § 242 void for vagueness in its first – and so far only – comprehensive analysis of the statute, in *Screws v. United States*, 325 U.S. 91 (1945). At least seven of the Justices recognized that the traditional case-by-case approach to defining due process could not constitutionally be used to define a criminal offense. The plurality opinion, concurred in by four justices, concluded that the close case-to-case distinctions produced by broad due process definitions would deny constitutionally adequate notice to potential defendants as to the federal criminality of their conduct:

> "The treacherous ground on which state officials, police, prosecutors, legislators, and judges would walk (if broad due process definitions were applied) is indicated by the character and closeness of the decisions of this Court interpreting the due process clause of the Fourteenth Amendment."
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> 325 U.S. at 97.

In order to save the constitutionality of the statute, the plurality held that the application of the statute must be confined to violations of specific provisions of the Constitution, specifically defined in the case law, and that an intent to commit such violations must be an element of the offense. The Court concluded that confining prosecutions "to those acts which are clearly marked by the specific provisions of the Constitution as deprivations of Constitutional rights", defined by "definite" case law,

and requiring a "specific intent to effect such deprivations", "saves the Act from any charge of unconstitutionality on grounds of vagueness." 325 U.S. at 103, 105. This holding was, in essence, a narrow application of the Black incorporation theory,[10] later more explicitly stated in his dissenting opinion in *Adamson v. California*, 332 U.S. at 68, *et seq.*

The Court illustrated its notion of the statute's proper application by citing concrete examples, which indicate that in criminal prosecutions the pre-existing definition of the due process violation must be factually specific. A

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[10] The *Screws* opinion's limitation of criminal due process violations to specific constitutional provisions "made definite by decision or rule of law" is suggestive of the Black incorporation theory, but is more restrictive. In illustrating the need for a narrow standard of criminality, the *Screws* opinion lists decisions applying Bill of Rights provisions as "illustrative of the kind of state action which might or might not be caught in the broad reaches of § 20, dependant on the prevailing view of the Court as constituted when the case arose". 325 U.S. at 97. This implies that a prosecution based upon a "specific" Bill of Rights provision would not be appropriate if it adopted an interpretation of that provision not "made definite by judicial decision". When the *Screws* opinion's examples of such overly-vague Bill of Rights violations are read in conjunction with its examples of due process violations which are sufficiently defined for criminal prosecution purposes (see the text of this brief, p. 18) it appears that the Court is limiting criminal prosecutions to violations that are either clearly apparent from the text of the Constitution, or have been announced in authoritative decisions involving facts that are rationally indistinguishable from the facts of the prosecuted case. This, essentially, is what the Court of Appeals held in the present case.

specific intent to violate an "express constitutional provision", made definite by court decision, would be shown, for example, if a local official persisted in enforcing a type of ordinance which the Court had held invalid on First Amendment grounds, or continued to select juries in a manner that "flies in the teeth of decisions of the Court". 325 U.S. at 104. On the other hand, the Court stated – in language directly applicable to the present case – an official's use of excessive physical violence against a citizen would not constitute a *per se* due process violation within the meaning of the statute: "The fact that a prisoner is *assaulted, injured or even murdered by a state official* does not necessarily mean that he is deprived of any rights secured by the Constitution or laws of the United States." 325 U.S. at 108, 109. (Emphasis added). It must be shown that the use of violence was intended to deprive the prisoner, and did deprive him, of specifically defined constitutional protections.

The majority held that the evidence in the *Screws* case was sufficient to establish a due process violation under this standard. The defendant had arrested the victim and had deliberately beaten him to death while in custody, having previously threatened to "get him". This was not only murder, but a deprivation of the prisoner's specific due process right to "a trial in a court of law, not a trial by ordeal. Those who decide to take law into their own hands and act as prosecutor, judge and executioner plainly act to deprive a prisoner of a trial right which due process of law guarantees him." 325 U.S. at 106. Although the evidence established the deprivation of a specifically

defined due process right, the Court reversed the conviction and remanded the case for retrial because the requisite instruction on specific intent, or bad purpose, had not been given.

The dissenters argued that the plurality's cure for vagueness was itself vague. It created a federal criminal common law, they asserted, that was unconstitutional *per se* and would produce unconstitutionally indefinite criminal offenses.[11] The dissenters were proponents of broad readings of the Due Process Clause, but they believed that even the restrictive reading adopted by the plurality was too indefinite for purposes of defining criminal liability.[12] For present purposes, the main significance of the *Screws* opinions is that none of these seven Justices were willing to recognize constitutional crimes based on judicial interpretations of broad due process concepts. It was

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[11] "To base federal prosecutions on the shifting and indeterminate decisions of courts is to sanction prosecutions for crimes based on definitions made by courts. This is tantamount to creating a new body of federal common law.

. . .

What the Constitution requires is a definiteness defined by the legislature, not one spelled out through the judicial process which, precisely because it is a process, cannot avoid incompleteness." 325 U.S. at 152, 153.

[12] "What are the criteria by which to determine what express provisions of the Constitution are 'specific' and what provisions are not 'specific'?" And if the terms of § 20 in and of themselves are lacking in sufficient definiteness for a criminal statute, restriction within the framework of "decisions interpreting the Constitution" cannot show the necessary definiteness. 325 U.S. at 150, 151.

a narrow incorporation approach, or no criminal due process law at all.

Subsequent § 242 assault cases have involved assaults upon arrestees, prisoners and other individuals in custody, and are subject to the *Screws* "trial and punishment by ordeal" rationale. This Court has not comprehensively revisited the statute since *Screws*. The Court has, however, come close to adopting an incorporation approach in civil 42 U.S.C. § 1983 cases involving assaults. In *Graham v. Connor*, 490 U.S. 386 (1989), the Court held that all § 1983 claims involving excessive force by law enforcement officers in effecting arrests, stop and search procedures, and other "seizure" procedures were to be confined to a Fourth Amendment analysis, and that all claims asserting the use of excessive force against convicts were to be confined to an Eighth Amendment cruel and unusual punishment analysis. The *Graham* opinion disapproved the "notion" that "there is a generic 'right' to be free from excessive force, grounded not in any particular constitutional provision but rather in 'basic principles of § 1983 jurisprudence' ". 490 U.S. at 393. Even more significantly for present purposes, the Court has elswhere made it clear that non-custodial assaults cannot be due process violations, by any analysis, because some form of incarceration or institutionalization is required to trigger the liberty interest in "bodily security." *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 200 (1984), discussed on pp. 24-27, *infra*.

3. The Government's Assertion That The Respondent's Conduct Violated § 242 Is Contrary To The Specificity Requirement Of The *Screws* Decision, And Contrary To Recent Precedent Of This Court Holding That Non-Custodial Assaults Do Not Violate Due Process Rights.

The assaults that are the subject of this prosecution obviously did not violate any "specific" provision of the Constitution, as required by the holding in *Screws v. United States*. Since none of the women were in custody or otherwise subject to pending legal process, the assaults cannot be considered "seizures" within the meaning of the Fourth Amendment, or "punishments" within the meaning of the Eighth Amendment. Apparently recognizing that fact, the Government asserts a violation of the liberty component of the due process clause itself.

In taking this approach, the government is doing precisely what the *Screws* Court held may not be done. It is attempting to construct a constitutional crime out of judicial interpretations of the due process clause itself, instead of confining § 242 "to those acts which are clearly marked by specific provisions of the Constitution". 325 U.S. at 105. Instead of enforcing a defined criminal offense, it is "referr(ing) the citizen to a comprehensive law library in order to ascertain what acts [are] prohibited." 325 U.S. at 96.

If there is an area of due process jurisprudence that, in the words of the *Screws* opinion, consists of "a large body of changing and uncertain law", it is the ongoing, open-ended definitions that have been given the concept of "liberty". See, *Board of Regents v. Roth*, 408 U.S. 564, 571 (1972) ("Liberty" and "property" are broad, majestic

terms . . . [T]hey relate to the whole domain of social and econo.nic fact. . . . "); *Paul v. Davis*, 424 U.S. 693, 710 (1976) ("It is apparent from our decisions that there exists a variety of interests which are difficult of definition but are nevertheless comprehended within the meaning of either "liberty" or "property" as meant in the due process clause."); *Ingraham v. Wright*, 430 U.S. 651, 673 (1977) ("The contours of this historic liberty interest (in being free from 'unjustified intrusions on personal security') have not been defined precisely."); and *Albright v. Oliver*, 510 U.S. 266 (1994) ("[T]he guideposts for responsible decision-making in this uncharted area [applying substantive due process liberty interest concepts] are scarce and open-ended.").

The government's argument implies a simplistic definitional formula: this Court has held that "bodily integrity" is (in some contexts) a "liberty interest" under the due process clause; physical assaults violate "bodily integrity"; thus, all physical assaults by public officials violate due process and are subject to prosecution under § 242. The high level of generality on which this analysis proceeds makes it essentially meaningless. The hard facts are that: 1) there is no judicial precedent for holding that a non-custodial assault violates § 242; 2) according to the *Screws* decision, a non-custodial assault cannot violate § 242 because it does not violate Fourth Amendment rights, Eighth Amendment rights, or any other right guaranteed by a specific constitutional provision; 3) this Court has held, in a civil context, that assaults that occur when the victim is not subject to the custody and control of the state do not violate his due process liberty interest. (See p. 27, *infra*). Thus, in order to sustain the present

conviction, this Court would be required to overrule the *Screws* holding, apply a broad due process definition to this criminal case, extend that definition, contrary to existing precedent, to a non-custodial assault, and determine that the Respondent is guilty of a constitutional crime that did not exist when he allegedly committed these assaults. Such a ruling would, itself, be a grave deprivation of due process.

Moreover, the breadth of the government's definition of due process violation renders the linchpin of the *Screws* decision – the specific intent requirement – inoperable. The primary means by which the *Screws* decision sought to remedy § 242's vagueness was by requiring proof of an intent to inflict a specific constitutional deprivation. The plurality opinion reasoned that if officials could be convicted only upon proof that they intended to cause specific results that had been declared unconstitutional, the problems of lack of notice, retroactivity and undue federal encroachment upon state law enforcement would be resolved. The Court defined the *Screws* defendants' crime as one of specific intent: assault of a prisoner with the intent of subjecting him to personally administered punishment, *in lieu* of lawfully authorized punishment, and the examples the Court gave of other proper applications of the statute likewise lent themselves to a specific intent requirement (enforcement of a specific type of ordinance, or the selection of a jury by a specific method, previously held unconstitutional).

But the specific intent requirement cannot be applied to the spacious definition of due process violation the government proposes here. "Unjustifiable intrusions upon physical integrity" – a.k.a. criminal assaults – are

inherently crimes of general intent. It was not proven, nor could it have been, that the Respondent had any intent other than a general intent to commit the assaults he was charged with committing. When criminal due process violations are defined as synonymous with criminal assaults, the specific intent requirement necessarily becomes a nullity. However phrased, the court's instruction to the jury will amount to the following: that any assaults committed by the defendant violate § 242 if he intended to commit them. The specific intent requirement will thus dissolve in the generality of the substantive definition of the crime.

At the time these assaults allegedly occurred, there were two Supreme Court decisions that had relevance to their due process implications. *Ingraham v. Wright*, 430 U.S. 651 (1977) and *DeShaney v. Winnebego County Department of Social Services*, 489 U.S. 189 (1984). Assuming that the *Screws* holding were overruled or disregarded, and assuming that the Court adopted a civil due process standard for defining § 242 violations *in lieu* of the narrow *Screws* standard, these decisions would define the outer perimeters of any criminal liability that could be imposed in this case.

Ingraham was an action for injunctive, declaratory and damages relief under 42 U.S.C. § 1981-88, alleging severe injury-producing[13] disciplinary paddlings of two junior high school students. The Court held that civil due

[13] One of the paddlings was alleged to have caused the student to suffer a hematoma and to have kept him out of school for 11 days, and the other allegedly deprived the student of the full use of his arm for a week.

process violations had not been alleged, because: 1) the Eighth Amendment Cruel and Unusual Punishment Provision applied to those convicted of crimes, not to school children subjected to disciplinary actions; 2) because they were administered while the children were subject to the legitimate control of state authorities, the paddlings implicated the children's non-fundamental liberty interests in "freedom from restraint and punishment", but 3) the availability of adequate state tort remedies to redress violations of those interests precluded any claim that due process had been denied.

The *DeShaney* case was a 1983 damages action brought against a county government, its department of social services and employees of that department, alleging that the defendants had released a four-year-old boy into the custody of his father, knowing that they were subjecting him to a risk of violence, and that the father had subsequently beaten the boy severely. The complaint alleged that the defendants had violated the boy's due process rights by failing to protect him from physical assaults they knew might or would occur. The Court held that no violation of the plaintiff's due process liberty interests had been asserted because the assaults occurred while the plaintiff was in his father's custody.

Neither of these decisions involved the anomalous circumstances of the present case, in which physical assaults committed by a non-custodial official are alleged to have been committed under color of law.[14] The

[14] None of the prosecuting witnesses in the instant case was within the "custody" or "care" of the Respondent or the state.

Ingraham decision indicated, however, and the *DeShaney* decision held, that non-custodial assaults do not implicate due process liberty interests.

The *Ingraham* decision described the violations of the Plaintiff's liberty interests, not as physical assaults, but as custodial punishments. The opinion states that, "while the contours of [the] historic liberty interest [prohibiting unjustified intrusions on personal security] have not been defined precisely, they have been thought to encompass freedom from *bodily restraint and punishment*"; that a liberty interest is implicated "where school authorities, acting under color of state law, deliberately decide to *punish* a child for misconduct *by restraining the child* and inflicting appreciable pain;" and that a "child's liberty interest in avoiding *corporal punishment while under the care of* public school authorities is subject to historical limitations." 430 U.S. 651, 673, 674 and 675. (emphasis added). A fair reading of the *Ingraham* decision is that the Court: 1) declined to extend Eighth Amendment due process protection to school disciplinary actions; but 2) held that such custodial punishments are within the "penumbra" of the cruel and unusual punishment provision of the

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They were all employees, applicants for employment or co-employees of the Respondent. Such relationships do not trigger the liberty interest found to have been violated in the *Ingraham* case. *Collins v. Harker Heights*, 503 U.S. 115, 127, 128 (1992) ("The 'process' that the Constitution guarantees in connection with any deprivation of liberty thus includes a continuing obligation to satisfy a certain minimal custodial standard. See, *DeShaney*, 489 U.S. at 200 . . . Petitioner cannot maintain, however, that the city deprived Collins of his liberty when it made, and he voluntarily accepted, an offer of employment").

Eighth Amendment, and therefore implicated nonfundamental due process liberty interests;[15] and 3) provided no rationale for extending the contours of those liberty interests beyond custodial punishment.

The *DeShaney* Court held that the plaintiff's liberty interests were not implicated because his father's assaults on him did not occur while he was in state custody. The case is distinguishable from the present case only in that the individual defendants were accused, not of assaulting the plaintiff, but of failing to protect him from assaults they knew, or had reason to know, would occur. The Court held that the state had a due process duty to prevent injury from assault only to individuals who are in state custody when the assault occurs:

> In the substantive due process analysis, it is the state's affirmative act of restraining the individual's freedom to act on his own behalf through incarceration, institutionalization, or other similar restriction of personal liberty which is "the deprivation of liberty" triggering the due process clause, not its failure to act to protect his liberty interests against harm inflicted by other means.
>
> 489 U.S. at 200.

Circuit court decisions have adhered to a custodial/non-custodial analysis in determining whether physical assaults and other injuries implicate due process liberty

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[15] C.f., *Griswald v. Connecticut*, 381 U.S. 479, 484 (1965) "[S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance").

interests. E.g., *Benavides v. Santos*, 883 F.2d 385 (5th Cir. 1989) (A jail guard injured during an escape attempt, allegedly because of the "callous indifference of jail officials", did not state a due process claim, although a similarly injured inmate might have done so, because the guard was not in custody when the injuries occurred); *Piechowicz v. United States*, 885 F.2d 1207 (4th Cir. 1989) (Government witnesses murdered by a contract killer who was hired by the individual against whom they testified, were not deprived of due process by the government's placing them in danger and failing to protect them, because due process duties "arise from limitations the states impose on the liberty of persons involuntarily in state custody . . . "); *Hillard v. City and County of Denver*, 930 F.2d 1516 (10th Cir. 1991) (A passenger abandoned in an impounded car by police and subsequently robbed was not deprived of a due process liberty interest because she was not in custody when the robbery occurred.) Anticipating the *DeShaney* holding, the *Hillard* court observed that the due process liberty interest identified in *Ingraham* might extend only to custodial assaults:

> The existence of a constitutional right to personal security as recognized in *Ingraham* may well depend on this element of legitimate state power over the individual.
>
> 930 F.2d at 1520.

DeShaney makes it clear that the due process liberty interest recognized in *Ingraham* does, indeed, depend upon the existence of legitimate state custody or control over the assaulted individual, and resolves the central issue in the present case. If due process protection is not "triggered" unless the injured party is institutionalized or

held in custody when it occurs, non-custodial assaults cannot violate due process rights under any circumstances.

4. The Requirement That A Non-Custodial Assault "Shock The Conscience" Of The Jury Does Not Qualify It As A Due Process Violation, And Does Not Sufficiently Define It As A Criminal Offense.

The government contended in the courts below that requiring the jury to find these non-custodial assaults "shocking to the conscience" sufficiently defined them as due process violations.[16] Using a "shocks the conscience" test to define a category of criminal due process violations is, again, precisely the methodology the *Screws* holding rejected. Indeed, in discussing the uncertainty produced by nebulous due process language, the *Screws* Court referred to very similar due process terminology: "That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in light of other considerations, fall short of such denial." 325 U.S. at 95. It is as clear as the English language can make it that "assault by a public official which shocks the conscience" is not a proper definition of a criminal due process violation according to the holding in *Screws*.

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[16] The present contention of the Solicitor General appears to be that the "shocks the conscience" requirement is a non-essential bonus for the Respondent, which gives the due process violations of which the Respondent was convicted more definition than is required.

Nor does it even describe a civil due process violation, according to contemporary Supreme Court case law. As noted, only custodial assaults have been held to violate due process liberty interests, and such assaults are subject to Fourth and Eight Amendment analysis, rather than a broad "shocks the conscience" analysis. *Graham v. Connor,* 490 U.S. 386 (1989). If there is any room left for generalized due process criteria in assault cases, it is difficult to find it in the current Supreme Court decisions.

Moreover, "shocking to the conscience" has never been employed as a jury standard, as it was in this case. Even those who have advocated it as a judicial standard, and have denied that it confers "boundless" illicit power upon judges, have never suggested that juries may be permitted to employ it to factually identify violations of due process. The originator of the phrase, Justice Felix Frankfurter, always qualified his advocacy of this and other general due process standards by emphasizing that they must be applied by judges, in accordance with the most exacting tenets of judicial decision-making.

He first used it in *Rochin v. California,* 342 U.S. 165 (1952) to describe the conduct of police officers who had obtained evidence in a drug case by forcibly pumping a suspect's stomach. In concluding that this was a due process violation, Frankfurter's majority opinion stated:

> This is conduct that shocks the conscience . . . It has long since ceased to be true that due process of law is heedless of the means by which otherwise relevant and credible evidence is obtained . . . Due process of law, as a historic and generative principle, precludes defining and thereby

> confining these standards of conduct more precisely than to say that convictions cannot be brought about by methods that offend a "sense of justice."
>
> 342 U.S. at 172.

In response to Justice Black's protest that this methodology was too "nebulous", Frankfurter stated that:

> The vague contours of the due process clause do not leave judges at large. We may not draw on our merely personal notions and disregard the limits that bind judges in their judicial functions. Even though the concept of due process of law is not final and fixed, these limits are derived from considerations that are fused in the whole nature of our judicial process . . . These are considerations rooted in reason and in the compelling traditions of the legal profession."
>
> 342 U.S. at 170.

Frankfurter had previously conceded in the *Screws* case that the "vague contours" of due process made it an inappropriate standard for defining criminal conduct, even when interpreted by disciplined, knowledgeable judges. Plucking the "shocks the conscience" language from the *Rochin* opinion, and using it as a *jury* standard in a *criminal* case, as was done in the trial of this case, ignores the intent of a carefully written opinion and does disservice to the Court's precedents.

Frankfurter's description of the judicial deliberations that must occur in identifying a due process violation becomes grotesque when applied to jury deliberations. Most jurors can bring little to this judge-like task *other*

than their "merely personal notions". The average juror knows nothing about the "limits . . . derived from considerations that are fused in the whole nature of our judicial process . . . [and are] deeply rooted in reason and in compelling traditions of the legal profession". With the best intent, jurors will necessarily apply a "shock the conscience" standard by deciding whether they are personally and subjectively shocked by what they have heard in court. Thus, constitutional crimes will be defined, not only on a case-by-case basis, but in accordance with the emotional reactions of individual jurors. Law so defined is no law at all.

5. General and Specific Effects of Affirming the Respondent's Conviction.

This case was effectively a state prosecution conducted in federal court. The government charged the Respondent with, and convicted him of, sexual harassments and assaults that would have been punishable under the Tennessee Criminal Code. The evidence presented did not differ from that which would have been presented in a state trial. No criminal intent was proven other than a general intent to commit the assaults. None of the women were in custody or otherwise subject to governmental process when the assaults allegedly occurred.

The only factor introduced into the trial that made even a pretense of distinguishing it from a state prosecution was the requirement that the jurors find that their consciences were shocked by the Respondent's conduct. Presumably shocked by all of it – from unconsented

touchings to serious assaults – they found the Respondent guilty of seven violations of the Constitution. Nothing like it has ever before occurred in an American courtroom.

This prosecution and conviction violate several basic tenets of our constitutional criminal justice system, including the following.

A. Reasonable Notice Of Crimes.

Clarity in defining crimes is the essence of due process. As early as 1399, King Henry IV warned Parliament against vague criminal laws, under which "no man knew, as he ought to know, how to do, say or speak, for doubt of the pains of treason". For centuries, English courts oppressed citizens by administering a nebulous offense called constructive treason, which was judicially invented and reinvented to fit the facts of individual cases.[17] One of the landmarks of due process in this Country was Chief Justice Marshall's ruling in Aaron Burr's 1807 treason trial, declaring constructive treason prosecutions unconstitutional. *United States v. Burr*, 8 U.S. 470, 4 (Cranch) 469 (1807).

The Supreme Court has consistently recognized the great dangers posed by vague criminal laws. The most

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[17] Constructive treason in 17th and 18th Century England has been described as "anything whatever which, under any circumstances, may possibly have a tendency, however remote, to expose the King to personal danger or to forcible deprivation of part of the authority incidental to his office." II Stephen, "History of the English Criminal Law" (MacMillan, 1880) p. 268.

obvious, as Henry IV noted, is lack of reasonable notice to potential defendants. When the contours of the criminal law are not clearly communicated, obedience becomes an unreasonable expectation and the rule of law breaks down.

This Court has repeatedly stated that "no one can be required at peril of his life, liberty or property to speculate as to the meaning of penal statutes." E.g., *Lenzetta v. New Jersey*, 306 U.S. 451, 453 (1939). In the *Lenzetta* case, the Court held that using the term "gangster" as part of a definition of a criminal offense deprived potential defendants of constitutionally adequate notice of the prohibited conduct. See also, *Dunn v. United States*, 442 U.S. 100 (1979) (Holding that the phrase "ancillary to grand jury proceedings" in a criminal perjury statute must be narrowly construed in order to avoid unconstitutional vagueness in its application); *Giaccio v. Pennsylvania*, 382 U.S. 399 (1966) (Holding void for vagueness a statute providing that the jury "shall determine by their verdict . . . whether the defendant shall pay costs"); and *Rabeck v. New York*, 391 U.S. 462 (1968) (Holding void for vagueness a statute prohibiting the sale of magazines "which would appeal to the lust of persons under the age of 18").

The federal crimes for which the present Respondent was prosecuted and convicted are at least as vaguely defined, and their application as hard to predict, as the crimes and constructions invalidated in the above decisions. Moreover, this prosecution created a never previously identified constitutional crime – non-custodial assault by a public official, which "shocks the conscience" – that contradicted or exceeded the scope of the holdings of all relevant Supreme Court and lower federal court

precedents. To find parallels for such a prosecution, it would be necessary to go back to the English constructive treason cases. Not only did the Respondent have no way to know, "as he ought to know", that his conduct was punishable as a federal crime, he had every reason to assume the opposite.

B. Judicial Encroachment upon a Legislative Function.

If the government's theory in this case were adopted, a vast field of federal criminal common law would be created. Section 242 would become an "undifferentiated font" of federal criminal law, defined – to the extent it was defined at all – by state criminal assault laws involving physical security and property interests. Federal courts would create federal crimes out of state crimes on a case-by-case basis with no congressional authority for doing so.

The precedents of this Court prohibit such unwarranted judicial encroachments upon legislative authority. *United States v. Wiltberger*, 18 U.S. 76, 95 (1820) (Marshall, C.J.) ("It is the legislature, not the court, which is to define a crime, and ordain its punishment"); *Paul v. Davis*, 424 U.S. 693, 701 (1976) (The broad language of the federal civil rights statutes cannot be employed as a judicial "font" of state law, for the creation of federal remedies never contemplated by the legislature.); *Screws v. United States*, 325 U.S. 91, 152, 153 (1945, dissenting opinion) ("[C]rimes must be defined by the legislature. The legislature does not meet this requirement by issuing a blank check to courts for their retrospective finding that some

act done in the past comes within the contingencies and conflicts that inhere in ascertaining the content of the Fourteenth Amendment by the gradual process of judicial inclusion and exclusion").

C. Encroachment Of Federal Law Enforcement Authority Upon State Law Enforcement Authority.

The *Screws* decision noted that a narrow definition of criminal due process violations was desirable, not only because it provided fair notice to defendants, but also because it maintained a proper balance between state and federal law enforcement. 325 U.S. at 108, 109.[18] Avoidance of undue federal encroachment upon state law enforcement authority has been a consistently expressed concern of this Court in interpreting federal statutes, to the extent that it has attained the status of a rule of statutory construction. See, e.g., *Rewis v. United States*, 401 U.S. 808, 812 (1971) (Adopting a narrow interpretation of the Travel Act, in part because a broad interpretation "would alter sensitive federal-state relationships, could overextend limited federal police resources, and might well produce situations in which . . . relatively minor state offenses [were transformed into] federal felonies"); and *United States v. Bass*, 404 U.S. 336, 350 (1971) (Adopting a narrow interpretation of a federal gun control statute (18 U.S.C.

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[18] "We agree that when this statute is applied to the action of state officials, it should be construed so as to respect the proper balance between the states and the federal government in law enforcement . . . Under our federal system the administration of criminal justice rests with the states except as Congress, acting within the scope of those delegated powers, has created offenses against the United States."

§ 1202(a)) in part because "the broad construction urged by the Government renders traditional local criminal conduct a matter for federal enforcement and would also involve a substantial extension of federal police resources").

This Court has similarly declined to adopt expansive interpretations of the due process liberty interest protected by § 1983, on the ground that doing so would convert large segments of state tort law into federal causes of action. E.g., *Paul v. Davis*, 424 U.S. 693, 700, 701 (1976). (A broad reading of the civil due process liberty interest, so as to include all state conduct that defames a citizen, "would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may be administered by the state."); *Parratt v. Taylor*, 451 U.S. 527, 544 (1981) (Interpreting § 1983 to apply to all unjustified takings of property "would almost necessarily result in turning every alleged injury which may have been inflicted by a state official 'acting under color of law' into a violation of . . . § 1983. It is hard to perceive any logical stopping place to such a line of reasoning"). Similarly, treating as due process violations all physical assaults by public officials which a judge or jury finds "shocking to the conscience" would render the Fourteenth Amendment a "font" of criminal law "to be superimposed upon whatever systems may be administered by the state".

The facts of the present case exemplify the problem. The Respondent was charged with a wide spectrum of misconduct, ranging from unconsented to touchings to oral rape. Obviously, the jury found all of these alleged

actions "shocking to the conscience". If all of them violated due process, or were capable of being found to have done so, what form of physical assault would not? And if some of them would not, at what point and on what basis can a line be drawn separating those which are merely state law offenses from those which violate due process of law. "To accept [the government's] argument that the conduct of the state official in this case constituted a violation of the Fourteenth Amendment would almost necessarily result in turning every alleged injury which may have been inflicted by a state official into a violation of the Fourteenth Amendment cognizable [under § 242]". See, 451 U.S. at 544. It would create a federal criminal common law applicable to the conduct of state officials and employees, virtually coextensive with the criminal laws of the 50 states. It is impossible to believe that the "drafters of the Fourteenth Amendment intended the Amendment to play such a role in our society". *Ibid.*

D. The Ex Post Facto Effect of Applying An Evolving Due Process Standard.

If the Respondent had been convicted of violating a federal criminal statute enacted after the assaults alleged in this case occurred, his conviction would obviously be a nullity under the *ex post facto* clause (Art. I, § 9) of the Constitution. The application of a judicially-created "non-custodial assault which shocks the conscience" standard to the facts of this case has an indistinguishable *ex post facto* effect. On the day the Respondent was indicted, it was clear, according to the *Screws* opinion, that assaults by state actors violated § 242 only if they occurred while

the victim was in custody and arguably deprived of specific constitutional rights under the Fourth, Fifth, Sixth or Eighth Amendments. Whatever the merits of the prosecutive theory asserted in this case – and they seem to be few – that theory is indisputably contrary to the *Screws* and *DeShaney* holdings, and had never been previously adopted by any court. Accepting that theory now and using it to justify convicting and sentencing the Respondent to 25 years in a federal penitentiary would be a gross violation of the *ex post facto* principle.

The prevention of retroactive application of evolving due process definitions was another reason the *Screws* decision confined § 242 prosecution to violations of specific constitutional provisions, specifically defined by court decisions. Theoretically, the Court noted, a person "commits a federal offense for which he can be sent to the penitentiary if he does an act which some court later holds deprives a person of due process of law." 325 U.S. at 97. It was in part to avoid such unfairness that the Court adopted a construction which permitted prosecutions only if the constitutional rights violated "had been made specific and definite" before the defendant's actions occurred. 325 U.S. at 105.

This Court has declined to give *ex post facto* effect to broad judicial interpretations of criminal statutes rendered after a defendant's allegedly criminal conduct occurred. E.g., *Marks v. United States*, 430 U.S. 188 (1977) (The defendants could not constitutionally be convicted of violating standards of obscenity announced in a Supreme Court decision rendered after the commission of the offenses with which they were charged, which materially enlarged the definition of criminal obscenity); *Bouie*

v. Columbia, 378 U.S. 347 (1964) (Prosecuting the defendant for trespass because he remained on premises after receiving notice to leave gave an impermissible *ex post facto* interpretation to a statute prohibiting unauthorized entries onto premises, notwithstanding that the defendant's conduct came within South Carolina's common law definition of trespass.) Even if the Court believed that the revolutionary expansion of federal law enforcement authority contended for here was otherwise a good idea, it would be brutally unfair and contrary to fundamental constitutional principle to make the present Respondent an object of that revolution.

E. Conferring Over-broad Prosecutive Discretion Through An Over-broad Definition of Criminality.

An "assault which shocks the conscience" standard of due process is also fundamentally unfair because it allows prosecutors to define crimes and select defendants nearly at will. It provides prosecutive discretion so broad as to be virtually legislative in scope, and undermines the rule of law at the point of application. One can image a federal prosecutor – either with or without personal or political axes to grind – deciding that the spectrum of harassments and assaults attributed to the Respondent in this case either are, or are not, "shocking to the conscience". He might decide, as the present prosecutor apparently did, that even the most minor of them was "shocking" conduct for a judge, and seek an indictment accordingly. He might, on the other hand, decide that even the most serious of them, while "shocking", were not "shocking to the *conscience*" in the "Frankfurter"

sense. The result would be – indeed has been[19] – gross inconsistency and discrimination in selecting defendants for prosecution, and the creation of an exceptionally handy weapon for personal and political retribution. If there were no other reason for rejecting the government's nebulous due process definition, avoidance of undue prosecutive discretion would be a more than sufficient reason for doing so. C.F., *Cox v. Louisiana,* 379 U.S. 559, 579 (1965) (Broad, vague criminal statutes do not "provide for government by clearly defined law, but rather for government by the moment-to-moment opinions of a policeman on his beat".)

5. The Availability Of Adequate State Criminal And Civil Remedies For the Respondent's "Random and Unauthorized Acts" Is A Bar To This Prosecution.

This Court has held in a series of cases that injuries to nonfundamental liberty and property interests inflicted by "random, unauthorized" acts of government employees and officials are not § 1983 due process violations if there are adequate state remedies for the injuries. This principle has been applied to deny federal relief to students severely injured by disciplinary paddlings, and prisoners deprived of personal property through the negligent and intentional acts of prison guards. *Ingraham v.*

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[19] Although § 242 and its predecessors have been law for well over 100 years, this is the first prosecution ever brought under it based upon non-custodial assaults by a non-custodial official. Given the number of such assaults that obviously have occurred over that time span, its uniqueness makes this an astoundingly selective prosecution.

Wright, 430 U.S. 651 51 L.Ed.2d 711 (1977); *Parratt v. Taylor*, 451 U.S. 527 (1981); and *Hudson v. Palmer*, 468 U.S. 517 (1984).

Even if the due process liberty interest were – *ex post facto* and contrary to precedent – extended to the non-custodial assaults alleged in the present case, this prosecution would be invalid pursuant to the above holdings. The actions for which the Respondent was convicted were certainly "random and unauthorized" and they were subject to fully adequate criminal and civil remedies under Tennessee law, being potentially prosecutable under various sections of the Tennessee Criminal Code[20] and a basis for damage suits under principles of Tennessee tort law.

Although the present case is a criminal prosecution rather than a civil damage suit, it is clearly within the rationale of the above § 1983 decisions. Those decisions in effect apply a procedural due process analysis to violations of nonfundamental substantive due process rights, when the violations are random and therefore unpredictable. Their unpredictability renders pre-deprivation state remedies impossible, and it is therefore held that post deprivation state remedies satisfy the requirements of due process, if they are comparable to the corresponding federal remedies.

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[20] The conduct alleged in this case is potentially prosecutable under Tennessee law, as assault (T.C.A. 39-13-101); aggravated assault (T.C.A. 39-13-102); aggravated rape (T.C.A. 39-13-502); rape (T.C.A. 39-13-503); aggravated sexual battery (T.C.A. 39-13-504) and sexual battery (T.C.A. 39-13-505).

The actions for which the present Respondent was prosecuted were at least as random and unpredictable as those for which the *Ingraham*, *Parrat* and *Hudson* defendants were sued, and the Tennessee state remedies are comparable to the remedies provided by federal law. If the actions of the state officials in the *Ingraham* case did not deprive the students they injured of due process of law, the actions of the present Respondent did not do so either.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Sixth Circuit Court of Appeals should be affirmed, and that judgment should be entered in favor of the Respondent.

Respectfully submitted,

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